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NO. 71-877
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1971

ALFONSO SMITH
PETITIONER

v.

STATE OF NEW HAMPSHIRE
RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF NEW HAMPSHIRE

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the New Hampshire Supreme Court is State v. Blake and Smith, 111 N.H. ____(decided June 30, 1971). Rehearing was denied July 29, 1971.

QUESTION PRESENTED

Is reference to defendant's race an

unreasonable discrimination if the reference has probative value to prove the defendant guilty of the commission of a crime.

STATEMENT OF THE CASE

Petitioner stands convicted of attempted larceny, a felony. RSA 582:3, 590:6. Petitioner stood trial with two co-defendants, one Blake and one Williams, who were also convicted of the same crime.

The crime was committed in Keene, New Hampshire, on September 13, 1968. The property stolen was a 1963 black Cadillac. T. v. II, 14. It was first noticed to be missing from the owner's car lot at about 10:00 p.m. T. v. II, 13, 40, 41. It had not been sold and had a value in excess of $100. T. v. II; 24, 25.

The car was reported stolen and within the hour the police located the car parked in Keene in the parking lot of a place called Riverside Plaza. T. v. II, 14, 15, 17, 60.

The police put the car under surveillance. T. v. II, 66, 69, 70. Shortly after 11:00 p.m. the surveilling officers observed a white Dodge automobile enter the Plaza parking lot, travel slowly through the lot passing the Cadillac and without stopping, exit the lot. Within two minutes the Dodge returned and again began traveling slowly through the lot. This time, however, the Dodge stopped about 12 feet from the Cadillac. The right rear door of the Dodge began to open. Anbther vehicle, a Ford, entered the lot at this time. When it did, the door of the Dodge closed and the Dodge circled the lot and returned to the Cadillac.

The right rear door of the Dodge opened again. This time a man got out and went to the driver's door of the Cadillac. He placed his hand on the door handle and his thumb on the knob. The officers now began to converge

on the scene. The man surmised the presence of the police and ran back to the Dodge, which had begun to move off when the man had gotten out. The man got back into the Dodge. He and the two other occupants of the Dodge were placed under arrest. T. v. II, 70-77, 106-109, 111, 112, 131-142, 163-165.

The three defendants were identified as the occupants of the Dodge. Williams was the driver, Smith the front seat passenger, and Blake the right rear seat passenger. T. v. II, 79, 82, 83, 145. The defendants did not dispute that they were in the Dodge as the State contended them to be. T. v. III, 28, 31, 34, 80, 81, 101, 102, 147, 165. Blake admitted being in the rear right seat of the Dodge. T. v. III, 170. There is also no dispute that Blake did get out of the Dodge. T. v. III, 41, 44, 106, 169.

The Dodge was searched. On the floor

of the Dodge by the rear right seat was found an ignition key for the Cadillac. As aforementioned, this was the area in which Blake had been seated. T. v. II, 75, 88, 95, 96, 120-122, 151, 152, 159.

The defendants are blacks. T. v. II, 45. One Secord, the sales manager of Fairfield Motors, the owner of the Cadillac, testified that on September 12, the day before the crime, he observed two colored men on Fairfield's lot where the Cadillac was kept. Secord further testified that he spoke to one of the men. In his testimony, Secord also said that during his conversation with the first man, Secord did not know where the second man had gone. Finally, Secord testified that the two men used a car which was a white or off-white Chrysler product and that a Dodge is a Chrysler product. T. v. II, 38, 40, 43, 44, 54.

Each of the defendants testified and each uniformly explained his presence in Keene to meet a girl. Blake was to see a girl he knew well, the two remaining defendants were to meet Blake's girl's two sisters. The defendants came from Springfield, and it was a two hour drive to Keene. The defendants claim to have become lost in Keene. The girl Blake said he wanted to see had a telephone and that "almost every night [he] talked to her on the phone". Nevertheless, the defendants did not telephone ahead to make a date or to get directions. Nor during the time the defendants claim to have been lost did they attempt to get to a telephone and call. T. v. III, 31, 32, 39, 73-75, 91, 121, 122, 125, 135, 172, 173.

The evidence which gives rise to appellant's claim of unconstitutionality is the testimony of Secord as to the presence of

the two colored men on Fairfield's car lot the day before the crime. The State offered the evidence as circumstantial evidence of the commission of the crime. T. v. II, 44-53. The defendant does not contest the probative value of the evidence but argues that the mere mention of his race is per se unreasonable discrimination and unduly prejudicial.

ARGUMENT

No useful purpose can be served by granting certiorari. Petitioner concedes before this Court, and had conceded before the Trial Court and the New Hampshire Supreme Court that Keene, New Hampshire, had a "substantially smaller Negro population ... than elsewhere". Petitioner also concedes that "in New Hampshire ... there are relatively few blacks". Petitioner's Brief p. 6,7. The evidence was offered to prove that the Petitioner was at the scene of the crime the

day before the crime was committed and for that purpose the evidence was probative. Characteristics which distinguish one human being from another and serve to identify a particular individual are not excludable evidence merely because the characteristics arise out of race. Stovall v. Denno, 388 U.S. 293. It has never been the law and in a universe such as ours it can never be the law. Indeed lack of due process can flow from not being acutely aware of a defendant's race. United States v. Wade, 388 U.S. 218, Gilbert v. California, 388 U.S. 263, Biggers v. Tennessee, 390 U.S. 404, Foster v. California, 394 U.S. 440.

Assuming the reference to lack probity, what harm has Petitioner suffered? That Petitioner and his co-defendants were black was perfectly obvious to both judge and jury. The evidence gathered at the scene of the

crime was more than sufficient to result in a conviction and it is difficult to see that Secord's testimony as to two unidentified colored men would have made a critical difference in the verdict. Assuming impropriety on the part of the prosecutor, why assume that judge and jury abandon all that is reasonable and responsible and become motivated solely by racial prejudice.

The case does not call for certiorari. No novel points of law are involved and there is no promise that the case can teach significantly either as to principle or administration. The case simply is unimpressive and unremarkable.

Respectfully submitted,

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